UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-hc-02182-FL

UNITED STATES OF AMERICA
Petitioner

v.

RICHARD SAVAGE
Respondent

RESPONDENT'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW the Respondent, RICHARD SAVAGE, by and through undersigned counsel, and respectfully moves to dismiss the § 4248 commitment proceedings against him. Savage does not seek to delay the upcoming trial on the merits by filing this motion and simply seeks to preserve his constitutional challenges in this case. In support of his motion, Savage shows the following:

STATEMENT OF THE CASE

1. On or about December 2006, Respondent Savage pled guilty to attempted distribution of heroin in violation of the District of Columbia Code. Thereafter the D.C. Superior Court sentenced him to 36 months active time (including credit for time served) followed by 5 years supervised release, and committed him to the Bureau of Prisons ("BOP") to serve the active portion of his sentence.
2. Savage was scheduled for transition to supervised release on December 27, 2008. Nine days before his release the government chose to certify Savage as "sexually dangerous" pursuant to 18 U.S.C. § 4248 (December 18, 2008), in order to stay his release and keep him confined at FCI 1 in Butner, North Carolina, a medium security Federal prison.

3. In its certification document, the government cited three sexually violent crimes committed by Savage. The first two were attempted rapes committed in 1984-85, when Savage was 17/18 years old. The third was an acquaintance rape of a woman who turned out to be 16 years old, committed in 1999. Although these offenses are substantial and significant, Savage has no other arrests or convictions for sexually violent offenses.[1]

4. Pursuant to § 4248, Savage has been held in custody of the BOP since December 2008 without benefit of judicial hearing on the merits of civil commitment. Subsequent to his certification he was adjudicated on a probation violation for a prior offense (not the charge of attempted distribution of heroin, and not a crime of sexual violence), and served an additional 24 months for this violation. The remainder of his confinement since December 2008 has been without benefit of judicial review on the government's certification pursuant to § 4248.

5. While Savage has been detained under § 4248, he has been managed by BOP corrections officers and remains subject to the same BOP rules and regulations promulgated for the management of prisoners that are punitive in effect, including but not limited to the placement in solitary confinement, recording and monitoring of phone calls (including calls to legal counsel), requirement to wear the same uniform as prisoners serving federal sentences, subjection to strip searches after visitation and random searches of his cell. In addition, Savage, along with other § 4248 detainees, is subject to routine searches of his personal effects, including legal papers and mail, under the guise of searching for contraband.

[1] Under the laws of several states, including North Carolina, Savage would be presently eligible to petition the trial court for permission to be removed from the sex offender registry, which allows the public to monitor the location of those convicted of sexually violent crimes.

6. Savage, through counsel, filed a Motion for Hearing on June 13, 2011, followed by notices of proposed hearing dates on October 13, 2011 and November 15, 2011. No hearing date has yet been set.

7. Thus, almost three years after his scheduled release date pursuant to the judgment of the D.C. Superior Court, and as yet having never been afforded a hearing for the review and determination of the issues raised by his confinement under § 4248, Savage remains incarcerated in the Federal Bureau of Prisons.

ARGUMENT

SECTION 4248 VIOLATES RESPONDENT'S CONSTITUTIONAL RIGHTS

I. Section 4248 Violates Respondent's Equal Protection Rights

Section 4248 irrationally discriminates between individuals who are in the custody of the Bureau of Prisons and those who are not, and by so doing, it violates Respondent's right to equal protection of the law, running afoul of the Fourteenth and Fifth Amendments. *Johnson v. Robinson*, 415 U.S. 361, 366 n.4 (1974) (citation omitted). Respondent invites the Court to accept as persuasive the analysis of *United States v. Timms*, No. 5:08-HC-02156-BO, 2011 U.S. Dist. LEXIS 71318 (E.D.N.C. 2011), and incorporates by reference the argument contained therein.

a. This Court should apply an intermediate level of scrutiny.

The essence of the Equal Protection of the law is that "all persons similarly situation should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citation omitted). As a general rule, courts allow wide latitude to legislative bodies where there is a legitimate government interest and the statute is rationally related to it. *Id*. at 440. Strict

scrutiny applies, however, when the statute in question distinguishes among individuals based on suspect classifications, or impinges on personal rights protected by the Constitution. *Id.*

Respondent acknowledges that some circuits have held that the less restrictive rational basis review is the proper standard for evaluating civil commitment statutes related to sexually dangerous persons. *E.g.*, *Varner v. Monohan*, 460 F.3d 861, 865 (7th Cir. 2006) (rational basis is appropriate standard for statute that sets different evidentiary burdens for persons with prior convictions for felony sexual offenses and persons without such prior convictions), *Carty v. Nelson*, 426 F.3d 1064, 1075 n.5 (9th Cir. 2005) (adopting without discussion rational basis review as the proper standard to uphold a statute allowing hearsay in a commitment hearing).

The Supreme Court has not, however, squarely addressed the issue of level of scrutiny for civil commitment statutes. *Hubbart v.* Knapp, 379 F.3d 773, 781 (9th Cir. 2004). While it has applied rational basis review in determining the validity of the various challenged statutes, even this scrutiny is thorough and probing. See, *e.g.*, *Jones v. United States*, 463 U.S. 354, 362 n.10 (1983) (the presence of Due Process procedural safeguards satisfies rational basis review of the challenged statute); *Baxstrom v. Herald*, 383 U.S. 107, 115 (1966) (no semblance of rationality in New York law that denies jury review for civil commitment of current inmates, but provides it for persons not currently incarcerated). Although Respondent contends that the Second Circuit has correctly concluded that the heightened review of the Supreme Court in cases of civil commitment amounts to intermediate scrutiny, *Francis S. v. Stone*, 221 F.3d 100, 111-2 (2000) (based on deprivation of liberty by virtue of civil commitment as a factor that requires due process protection), the remainder of Respondent's argument contends that, even at the lowest level of scrutiny, there is no rational relationship between § 4248 and the purported government interests.

b. Section 4248 creates an irrational distinction between similarly situated individuals in BOP custody and not in BOP custody.

18 U.S.C. § 4248 distinguishes between persons in BOP custody and those not in BOP custody, in that it provides for civil commitment of certified sexually dangerous persons only in the former instance.[2] Respondent contends that these individuals are similarly situated, and that the applicability of § 4248 to the former group but not to the latter group, is an irrational distinction that violates the essence of equal protection.

The Supreme Court struck down, on Equal Protection grounds, a New York law providing different civil commitment procedures to prisoners nearing the end of their sentence, from those mandated for the general public. *Braxton*, 383 U.S. 107. It also invalidated an Indiana law that subjected persons charged with a criminal offense to a more lenient standard of commitment (and more stringent standard of release) than applied to others not so charged. *Jackson v. Indiana*, 406 U.S. 715, 730 (1972). Likewise it held a Wisconsin Sex Crimes Act unconstitutional, which established commitment procedures for those convicted of sex crimes with fewer safeguards than those provided to the general public. *Humphrey v. Cady*, 405 U.S. 504, 511 (1972).

In the case of § 4248, only prisoners within the custody of BOP are singled out for prospective commitment as Sexually Dangerous Persons. "Since the Government cannot provide less protection during civil commitment for prisoners than for nonprisoners, it follows that the government cannot commit prisoners while categorically shielding nonprisoners from

[2] Section 4248 also applies to individuals who are in the custody of the Attorney General because they are incompetent to proceed to trial, as well as individuals whose charges have been dismissed solely because of their mental condition. 18 U.S.C. § 4248 (a). An Equal Protection analysis of individuals in these circumstances is not relevant to the claims of this Respondent.

civil commitment altogether." *United States v. Timms*, No. 5:08-HC-02156-BO, 2011 U.S. Dist. LEXIS 71318 (E.D.N.C. filed July 1, 2011).

Respondent Savage acknowledges that some trial courts have held that federal prisoners and nonprisoners are not similarly situated. *United States v. Shields*, 522 F. Supp. 2d 317, 340 (D. Mass., 2007). The trial court in *United States v. Carta* explained the distinction in that the government is better able to make identification and provide treatment with respect to persons in federal custody. 503 F. Supp. 2d 405, 408 (D. Mass., 2007). Respondent notes that the government has not provided him treatment while incarcerated pre-certification. As to the issue of identifying potential sexually violent persons for commitment, Respondent respectfully contends that the *Carta* distinction is roughly akin to looking for a lost object at night under a streetlight as opposed to a dark sidewalk. Identification may be easier in the former location than the latter, but this distinction is meaningless for purposes of finding what has been lost. Likewise, the ability of the government to develop a substantial paper trail for prisoners within BOP custody, and to subject them to ongoing psychological evaluation and monitoring is not rationally related to the goal of protecting the general public from sexually violent persons. For this purpose, federal prisoners and nonprisoners are, in fact, similarly situated.

The First Circuit, affirming *Carta*, applied a somewhat modified equal protection analysis, finding that federal prisoners and nonprisoners were not similarly situated because the government already had custody of the former, while it lacked a general police power over the latter. 592 F.3d 34, 44 (2010). Thus it is "inevitable" that § 4248 applies only to individuals in BOP custody. *Id.*

The *Timms* court makes two telling criticisms of *Carta* on this point: 1) the federal government does have general police power in some limited circumstances, *e.g.* those within the

maritime and territorial jurisdictions of the United States, and Congress has made no similar attempt to civilly commit prospective sexually dangerous persons pursuant to its powers.[3] 2011 U.S. Dist. LEXIS 71318 at 14. And, in broader terms, 2)

> *Carta*, wrongly, allows the doctrine of limited and enumerated federal powers to bypass the Constitution's equal protection guarantee. The *Carta* reasoning is ironic. The federal government cannot use its limited powers as a justification for assaulting the Bill of Rights. If the federal government does not have the power to apply its civil commitment scheme to everyone, then it should not civilly commit anyone. *Id.* at 14.

Given that the Supreme Court has repeatedly held that civil commitment statutes that distinguish between prisoners and nonprisoners violate equal protection of the law, even under a rational basis review, and given that Congress has made exactly that distinction in § 4248, and has made no attempt to extend its civil commitment powers to other classes of similarly situated individuals, *e.g.* those subject to its general police power, Respondent respectfully contends that the application of § 4248 in his case is unconstitutional as a violation of his equal protection rights under the Fourteenth and Fifth Amendments to the United States Constitution.

II. Section 4248 Fails to Provide for a Speedy Determination as to Confinement

Section 4248, by its terms, allows the government to certify a prisoner within BOP custody as a sexually dangerous person at any time, even mere days or hours before the prisoner's term of incarceration is scheduled to end. 18 U.S.C. § 4248 (a). Once the certificate is filed, the government can continue to hold the detainee indefinitely while the detainee awaits a

[3] Indeed, civil commitment pursuant to § 4248 does not even extend to all prisoners housed within BOP facilities. *See, e.g, United States v. Joshua*, 607 F.3d 379 (4th Cir., 2010) (military officer housed in BOP facility pursuant to a "Memorandum of Agreement" between the Army and BOP not subject to § 4248), *United States v. Hernandez-Arenado,* 571 F.3d 662 (7th Cir., 2009) (foreign national detained by ICE and housed in BOP facility not subject to § 4248).

hearing. *Id.* The detainee has no recourse under the statute to prevent lengthy and even unwarranted confinement.

Respondent Savage's experience under § 4248 highlights the excesses of this process. The government filed its certification of Savage on December 18, 2008. As of the filing of this Motion to Dismiss, Savage's hearing has not yet been set. Over the past almost three years, Savage has diligently sought to move his case along. Savage respectfully contends that his extended confinement is an unconstitutional violation of his Fifth Amendment right not to be deprived of life, liberty or property without due process of law. U.S. Const. amend V.

Respondent invites the Court to accept as persuasive the analysis of *United States v. Timms*, No. 5:08-HC-02156-BO, 2011 U.S. Dist. LEXIS 71318 (E.D.N.C. 2011), and incorporates by reference the Due Process argument contained therein.

a. Respondent Savage is entitled to due process protection of a speedy determination of the facts in his case.

The Fifth Amendment protects the detainee's interest in liberty, which includes his interest in avoiding physical confinement after the completion of his criminal sentence. *See Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment constitutes a significant deprivation of liberty and requires due process protection); *United States v. Broncheau*, 645 F.3d 676, (4th Cir., 2011) (Wynn, J., concurring)

The Supreme Court identified three factors to be considered in determining what process is due under the Constitution:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

When § 4248 is analyzed under the *Matthews* factors, Savage respectfully contends that his Due Process rights have clearly been violated by its application to him. First, as noted *supra*, the private interest implicated is Savage's right to be free from indefinite physical confinement, a fundamental right under our constitution. U.S. Const. amend V.

As to the second *Matthews* factor, the lack of a speedy factual determination in Respondent Savage's case has resulted in substantial confinement without a hearing.[4] Indeed, the risk of erroneous detention is significant under § 4248. As noted in *Timms*, the government has stipulated to dismiss several of these cases after substantial periods of unreviewed civil confinement. 2011 U.S. Dist. LEXIS 71318 at 20-21 ("[§ 4248] allows a unilateral and unreviewable deprivation of liberty to continue indefinitely").

Regarding the third *Matthews* factor, Respondent Savage respectfully contends that whatever additional burden a speedy factual determination would impose on the government would be minimal in comparison to the indefinite confinement of the detainee.

In *United States v. Shields*, the trial court upheld the validity of § 4248, in part by interpreting the statute to include a reasonable time requirement on the mandated hearing. 522 F. Supp. 2d 317, 336-37 (2007) (acknowledging that the text of the statute without such additional interpretation would run afoul of the detainee's Fourth and Fifth Amendment rights). While the Supreme Court has not weighed in on the maximum period of pre-hearing confinement allowable before Due Process rights are implicated, it has affirmed the constitutionality of involuntary detention for up to 45 days without a hearing, *Logan v. Arafeh*, 346 F.Supp. 1265 (D.

[4] The government filed its certification on Savage in December 2008, and his 36 month sentence was completed on or about January 2009. It appears from the record that, subsequent to Savage's certification, he was adjudicated for a probation violation on a prior offense, for which he served around 24 months. Thus he has been detained pursuant to § 4248 for almost 11 months as of the filing of this motion.

Conn. 1972), and a 10-day delay before hearing. *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977). Respondent Savage respectfully contends that a pre-hearing period of involuntary confinement consisting of a few days or weeks likely passes Due Process muster, while his detention for months or years does not.

b. The appropriate remedy for Respondent Savage is dismissal of the government's certification.

> This does not excuse what may be a pattern in which the government certifies prisoners as sexually dangerous mere days before their scheduled release, thereby guaranteeing that they will be held for an extended period beyond that date even if there is little basis for the charge. Any such practice is a result of improper administration, not statutory command. The government deserves fair warning and a modest additional period to frame the necessary regulations limiting the period of detention without a hearing; after that, it is likely to find courts imposing remedies. *United States v. Carta*, 592 F.3d 34, 43 (1st Cir., 2010).

The "pattern" of abusive application of § 4248 described by the First Circuit in *Carta* is exactly the experience of Respondent Savage. Section 4248 was enacted in 2006. The government made no effort at that time to certify Respondent Savage as a sexually dangerous person. On September 7, 2007, the *Comstock* district court opinion struck down § 4248, and on January 8, 2008 the Eastern District of North Carolina declined to proceed with hearings, motions practice or other proceedings under § 4248 pending the appeal of *Comstock.* When the government certified Savage, on December 18, 2008, it knew he was unlikely to receive a timely hearing in this district, yet it made no attempt to protect his Due Process rights by, *e.g.* transferring him to a BOP institution in a district where § 4248 hearings were still taking place. During the pendency of these proceedings, Savage has been diligent in seeking relief throughout the period of his detention, asserting all along that his detention violated his Constitutional rights.

Respondent Savage respectfully contends that the government has unconstitutionally deprived him of his due process rights under the Fifth Amendment of the United States

Constitution. The government should have sought certification timely so as to resolve this issue before the completion of his sentence, or, at the least, brought Savage before a judicial hearing for a civil commitment hearing within a reasonable time after certification. The course chosen by the government has caused a substantial and prejudicial deprivation of Savage's liberty. The only proper remedy before this Court is dismissal of the action against Savage. *Cf. Barker v. Wingo*, 407 U.S. 514, 522 (1972) (dismissal for violation of right to speedy trial); *Carta*, 592 F.3d at 43 (court imposed remedies appropriate where detainee's hearing has been inordinately delayed).

III. Respondent Savage has been Subjected to an Unconstitutional Prosecution

Respondent Savage respectfully contends that § 4248 is essentially criminal in nature, and therefore it affords individuals subject to its application the entire panoply of fundamental protections required by the Constitution in a criminal prosecution, including those protections embodied in the *Ex Post Facto* clause, the Fourth Amendment, the Sixth Amendment and the Eighth Amendment.

Respondent Savage acknowledges that the Fourth Circuit has held that § 4248 is entirely civil in nature, and that the protections that attach to criminal due process are not applicable in these cases. *United States v. Comstock*, 627 F.3d 513 (2010) ("*Comstock II*"). Nonetheless, Savage anticipates the possibility that this question may at some point be considered by the Supreme Court, and wishes to preserve these issues for review if and when they become subject to appeal.

CONCLUSION

For the foregoing reasons, Respondent Savage respectfully contends that § 4248 is unconstitutional as applied in his case. Thus Savage requests the Court to dismiss the § 4248 proceedings and release him to the supervision of the United States Probation Office.

Respectfully submitted, this the 18th day of November, 2011.

GILLETTE LAW FIRM, PLLC

/s/ Jeffrey William Gillette
Jeffrey William Gillette
Attorney for the Respondent
N.C. State Bar # 38179
19 West Hargett Street, Suite 601
Raleigh, NC 27601
Tel: (919) 747-8290
FAX: (877) 787-6576

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion to Retain Expert Witness has been duly served on the following:

Mr. Michael D. Bredenberg,
Federal Medical Center
P.O. Box 1600
Butner, NC 27509

Mr. G. Norman Acker, III
Mr. R.A. Renfer, Jr.
W. Ellis Boyle
U.S. Attorney's Office
Room 800, 310 New Bern Ave.
Raleigh, NC 27601

Service was made by electronically filing the foregoing with the Clerk of Court on July 28, 2011, using the CM/ECF system which will send notification of such filing to the above.

This the 18th day of November, 2011.

GILLETTE LAW FIRM, PLLC

/s/ Jeffrey William Gillette
Jeffrey William Gillette
Attorney for the Respondent
N.C. State Bar # 38179
19 West Hargett Street, Suite 601
Raleigh, NC 27601
Tel: (919) 747-8290
FAX: (877) 787-6576